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December 30, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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DEC 30 1998

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Re: Ex Parte
Reciprocal Compensation for Dial-up Calls to ISPs
CC Docket No. 98-96, CPD No. 97-30

Dear Ms. Salas:

Attached is a copy of a brief filed by Ameritech-Illinois in the United States Court of Appeals for the Seventh Circuit. Ameritech, in this brief, takes the position that dicta in the Commission's October 30 GTE ADSL decision (CC Docket No. 98-79) is dispositive of the issue of whether reciprocal compensation must be paid for the transport and termination of calls to Internet Service Providers. While the Commission has stated that one of its goals in this proceeding is that it not disturb the twenty-four state commission decisions which unanimously concluded that such compensation is owed, it is obvious that Ameritech (and other RBOCs) will seek to construct a theory which undermines any such effort. As the Commission considers its decision on the application of reciprocal compensation to dial-up calls to the Internet, it should take great pains to ensure that its decision cannot be used to undercut the very goal it seeks to accomplish.

Sincerely,

Richard M. Rindler

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cc: Kathryn Brown
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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U.S. COURT OF APPEALS
SEVENTH CIRCUIT

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Plaintiff-Appellant,

v.

WORLDCOM TECHNOLOGIES, INC., as
successor in interest to MFS INTELENET OF
ILLINOIS, INC., TELEPORT
COMMUNICATIONS GROUP, INC.,
MCI TELECOMMUNICATIONS CORP., INC.,
and MCIMETRO ACCESS TRANSMISSION
SERVICES, INC., AT&T COMMUNICATIONS
OF ILLINOIS, INC., and FOCAL
COMMUNICATIONS CORPORATION,

Defendants-Appellees,

and

DAN MILLER, RICHARD KOHLHAUSER,
RUTH KRETSCHMER, KARL MCDERMOTT,
and BRENT BOHLEN, Commissioners of the
Illinois Commerce Commission (In Their Official
Capacities and Not as Individuals),

Defendants.

On Appeal from the United
States District Court for the
Northern District of Illinois,
Eastern Division,
No. 98 C 1925,
Hon. David H. Coar,
Presiding

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

U.S.C.A. - 7th Circuit
RECEIVED
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GINO J. AGNELLO
CLERK

ILLINOIS BELL TELEPHONE COMPANY)
d/b/a AMERITECH ILLINOIS,)

Plaintiff-Appellant,)

v.)

WORLDCOM TECHNOLOGIES, INC., as)
successor in interest to MFS INTELENET OF)
ILLINOIS, INC., TELEPORT)
COMMUNICATIONS GROUP, INC.,)
MCI TELECOMMUNICATIONS CORP., INC,)
and MCIMETRO ACCESS TRANSMISSION)
SERVICES, INC., AT&T COMMUNICATIONS)
OF ILLINOIS, INC., and FOCAL)
COMMUNICATIONS CORPORATION,)

Defendants-Appellees,)

and)

DAN MILLER, RICHARD KOHLHAUSER,)
RUTH KRETSCHMER, KARL MCDERMOTT,)
and BRENT BOHLEN, Commissioners of the)
Illinois Commerce Commission (In Their Official)
Capacities and Not as Individuals),)

Defendants.)

On Appeal from the United
States District Court for the
Northern District of Illinois,
Eastern Division,
No. 98 C 1925,
Hon. David H. Coar,
Presiding

CERTIFICATE OF INTEREST

The undersigned, counsel of record for Illinois Bell Telephone Company d/b/a Ameritech Illinois, plaintiff-appellant, furnishes the following information in compliance with Circuit Rule 26.1:

1. The full name of every party or amicus the attorney represents in the case:

Illinois Bell Telephone Company d/b/a Ameritech Illinois.

2. If such a party or amicus is a corporation:

(i) Its parent corporation, if any:

Ameritech Corporation.

(ii) A list of stockholders which are publicly held companies owning more than 10% of the stock in the party or amicus:

Ameritech Corporation.

3. The names of law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Mayer, Brown & Platt.

Dated: August 25, 1998

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This case arises under the Telecommunications Act of 1996, Pub. L. No. 104-104, 47 U.S.C. § 151 *et seq.* The district court had jurisdiction pursuant to 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. This Court has jurisdiction over the district court's judgment pursuant to 28 U.S.C. § 1291.¹

STATEMENT OF THE CASE

The Telecommunications Act of 1996 requires incumbent local exchange carriers, like Ameritech, to allow competing local exchange carriers, like the Carrier Appellees, to interconnect their network facilities with the incumbents' networks. 47 U.S.C. § 251(c). Among other things, this "interconnection" permits customers of an incumbent local exchange carrier and its competitor to complete telephone calls to each other. To accommodate such calls, the Act mandates that each local exchange carrier "establish reciprocal compensation arrangements for the transport and termination of telecommunications" (*id.* § 251(b)(5)), and that those arrangements "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." *Id.* § 252(d)(2). Upon request, incumbent local exchange carriers must implement the Act's requirements, including reciprocal compensation, by entering into interconnection agreements with competing local exchange carriers who so request.

¹ The district court entered judgment in favor of the "Carrier Appellees" on August 4, 1998. The court did not enter judgment then as to the "Commissioner Appellees," whose motions to dismiss were still pending. Ameritech therefore filed a notice of appeal (No. 98-3150), naming only the Carrier Appellees as appellees, on August 25, 1998. That same day, the district court denied the Commissioners' motions to dismiss. On September 4, 1998, Ameritech filed a second notice of appeal (No. 98-3322), naming all the defendants as appellees. This Court consolidated the two appeals on November 25, 1998. The Court then consolidated the Commissioners' separate appeal (No. 98-4080) with Ameritech's appeals on December 8, 1998.

Id. § 252. In lay terms, the 1996 Act requires competing local phone companies to pay each other for terminating each other's calls.

In accordance with the Act, Ameritech entered into an "Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996" with each of the carriers that are appellees in this case. Those agreements specify that the reciprocal compensation arrangements in the agreements are "As Described in the Act." And, pursuant to sections 251(b)(5) and 252(d)(2) of the Act, the agreements limit each carrier's obligation to pay reciprocal compensation to "local traffic" that "terminat[es] on the other Party's network."

In 1997, the Carrier Appellees filed complaints against Ameritech with the Illinois Commerce Commission ("ICC"), claiming that Ameritech owed them reciprocal compensation for all communications between Ameritech customers and the Internet where the Internet service provider (such as America Online) that furnished those Ameritech customers access to the Internet was a customer of one of the Carrier Appellees. Ameritech responded that it has no obligation, under its agreements implementing the Act, to pay reciprocal compensation on such communications because Internet traffic, as a matter of federal law, terminates on the Internet and not on the network of any Carrier Appellee, and because Internet traffic is not local traffic.

On March 11, 1998, the ICC rejected Ameritech's reliance on federal law, holding that the communications between Ameritech's customers and the Internet terminate at the point where the Internet service provider connects to the local network, not on the Internet. Therefore, according to the ICC, Ameritech had to pay the complaining carriers the reciprocal compensation they claimed for that Internet traffic. On July 21, 1998, the district court affirmed, deferring to the ICC's view that Internet traffic terminates at the Internet service provider,

notwithstanding that “the ISP then connects the user to the Internet, where the user may access unlimited web sites.”

ISSUE PRESENTED FOR REVIEW

Whether Ameritech has an obligation to pay reciprocal compensation on its customers’ Internet communications, where reciprocal compensation applies only to local traffic originated by Ameritech for termination on the network facilities of another local exchange carrier.

STATEMENT OF FACTS

1. The 1996 Act

The Telecommunications Act of 1996 (“1996 Act” or “Act”) was the culmination of efforts over several years by legislators and telephone companies to open to competition the market for all types of telephone service, including local exchange service, access services and long distance service. This case arises out of the provisions of the 1996 Act that aim to promote competition in local telecommunications markets.

A provider of local telephone service is called a “local exchange carrier” (47 U.S.C. § 3(44)), or “LEC.” A company, like Ameritech,² that was providing local telephone service when the 1996 Act became law is an “incumbent local exchange carrier” (47 U.S.C. § 251(h)), or “incumbent LEC,” and a company that competes with an incumbent LEC is a “competing local exchange carrier,” or “competing LEC.”

Sections 251 and 252 of the Act establish the requirements and process by which competing LECs may interconnect with (47 U.S.C. § 251(c)(2)) and gain access to facilities (47

² “Ameritech” means Appellant Illinois Bell Telephone Company d/b/a Ameritech Illinois.

U.S.C. § 251(c)(3)) and services (47 U.S.C. § 251(c)(4)) of incumbent LECs to provide competing local service. When a competing LEC builds its own local network, it interconnects its facilities with the incumbent LEC's network facilities so that local calls can be made between customers on the two networks. When such calls are made, they originate on one carrier's network and terminate on the other. The 1996 Act imposes on all LECs a duty to establish arrangements for inter-carrier compensation for such calls.

Two sections of the Act address this duty of "reciprocal compensation," and both impose reciprocal compensation only on calls that the compensated carrier terminates on its network. Section 251(b)(5) imposes on each local exchange carrier the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Section 252(d)(2) provides that reciprocal compensation arrangements under section 251(b)(5) must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" 47 U.S.C. § 252(d)(2)(A)(i).

2. Ameritech's Interconnection Agreements with the Carrier Appellees

The substantive obligations of the Act must be implemented by "interconnection agreements" between incumbent LECs and competing LECs. 47 U.S.C. § 252(b). The Illinois Commerce Commission ("ICC") Order at issue here ("ICC Order") purports to enforce Ameritech's interconnection agreements (the "Agreements") with five competing LECs, now appellees in this case (collectively, the "Carrier Appellees").³ The Agreements are based on and

³ The Carrier Appellees are: WorldCom Technologies, Inc. as successor in interest to MFS Intelenet of Illinois, Inc. ("MFS"), Teleport Communications Group, Inc. ("TCG"), MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc.

implement the Act. Each one is entitled "Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996." (SA31; SA51; SA64; SA83; SA94.)[‡] Four of the Agreements say that they "set forth . . . the terms and conditions under which the Parties will interconnect their networks and provide other services as required by the Act as set forth herein." (SA32; SA52; SA84; SA95). The fifth says: "The parties acknowledge that [their] respective rights and obligations . . . are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date." (SA68.)

As required by section 251(b)(5) of the Act, the Agreements establish reciprocal compensation arrangements between the parties. And, in keeping with the contract provisions quoted in the last paragraph, those arrangements are "as required by the Act." All five of the Agreements specifically provide: "'Reciprocal Compensation' is As Described in the Act." (SA48; SA57; SA80; SA89; SA100.) The reciprocal compensation provision in each Agreement appears under a heading that cites the corresponding provision in the Act: "Reciprocal Compensation Arrangements - Section 251(b)(5)." (SA34; SA60-61; SA67; SA91; SA103.) Finally, pursuant to sections 251(b)(5) and 252(d)(2) of the Act, the governing provision in each Agreement specifies that only local traffic which "terminat[es] on the other Party's network" is eligible for reciprocal compensation: "Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [Carrier Appellee] which a Telephone

(together, "MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), and Focal Communications Corporation of Illinois ("Focal").

[‡] "SA" refers to the Separate Appendix filed with this brief.

Exchange Service Customer originates on Ameritech's or [Carrier Appellee's] network for termination on the other Party's network." (SA34; SA61; SA67; SA91; SA103).

The reference to local traffic in the Agreements also corresponds with the FCC's interpretation, expressed before the Agreements were entered, that reciprocal compensation under the 1996 Act applies only to local traffic. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶ 1034 (Aug. 8, 1996) (First Report and Order) (SA106, 107); In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 F.C.C. Rcd. 14171, ¶ 230 (Apr. 19, 1996) (Notice of Proposed Rulemaking).⁵ See also 47 U.S.C. § 251(g).

3. The Local Telephone Network⁶

The local telephone network serves two distinct purposes: first, it carries local traffic, that is, communications that originate and terminate within a local calling area; and second, it serves as a point of access for traffic that originates on the local network but terminates on networks outside the local calling area, such as long distance telephone calls and Internet traffic.

⁵ In its First Report and Order, the FCC held: "We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area . . . [R]eciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call." Although the FCC's reciprocal compensation rules (47 C.F.R. § 51.701 *et seq.*) were held to exceed the FCC's authority in that they purported to regulate local, not interstate, traffic (Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (cert. granted, 118 S.Ct. 879 (1998))), the FCC's conclusion as to the scope of section 251(b)(5) was not questioned.

⁶ A more expansive version of this explanatory material, reproduced from the record below, appears at SA252-62. Illustrative diagrams appear at SA313-22.

a. Local Traffic

If Ameritech customer Smith calls Ameritech customer Jones in the same calling area, Ameritech carries the call from Smith's house to the Ameritech end office (a mile away, perhaps) that serves Smith. The end office houses an end office switch, which is a specialized computer. The switch "reads" the phone number that Smith called, and routes the call to the end office that serves Jones. There, that end office switch routes the call to Jones's house. The call is said to be "terminated" by the end office switch that serves Jones.

With the introduction of competition, competing LECs such as Carrier Appellee TCG have entered the local service market. TCG has installed network facilities in Chicago, and some former Ameritech customers — including, in this example, Wilson — have selected TCG as their local exchange carrier. When Smith calls Wilson, the call starts out like Smith's call to Jones: Ameritech carries the call from Smith's house to the Ameritech end office that serves Smith, where the end office switch "reads" the called number and routes the call. But because Wilson is a TCG customer, the call has to be carried to TCG so it can terminate the call to Wilson. The Ameritech end office switch that serves Smith therefore routes the call to TCG's facilities, where Ameritech hands off the call to TCG, which then terminates the call to Wilson's house.

Because this local exchange call originated on Ameritech's network and terminated on TCG's network, Ameritech compensates TCG pursuant to § 251(b)(5) of the 1996 Act and the interconnection agreement between Ameritech and TCG. This is "reciprocal compensation" — "reciprocal" because just as Ameritech compensates TCG for terminating local exchange calls on TCG's network that originate on Ameritech's network, so TCG compensates Ameritech for

terminating on Ameritech's network local exchange calls that originate on TCG's network (e.g., a call from Wilson to Smith).

b. Access Service

The same network facilities that are used to transport and terminate local exchange traffic are also used for another purpose: to connect local exchange customers to providers of interstate telephone services and other services that are not furnished by the local exchange carrier. Interstate telephone calls, for example, do not terminate within the local calling area where they originate, but instead are carried by long distance companies beyond the local area. Thus, the local exchange carriers in the calling area where such traffic originates do not terminate such traffic, but instead provide an "access" service to long distance companies. That is, they furnish the long distance companies access to the local network, and to the local exchange carriers' customers on that network.

The common denominator of long distance companies and other users of access service is that each "obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location" on their way to their ultimate out-of-state destinations. MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (July 27, 1983). In other words, the defining characteristic of access service is the use of local networks to originate and terminate communications between different networks, outside the local calling area. This section describes two basic types of access users: long distance telephone companies (or "interexchange carriers") and "enhanced service providers," which includes Internet service providers.

Turning first to interexchange carriers: If Ameritech customer Smith, in Chicago, calls his cousin in Denver, Ameritech delivers Smith's call to Smith's long distance company, say, Sprint. Sprint has a switch (called a "point of presence," or "POP") in the Chicago area. Ameritech hands off the call to Sprint at that POP, and Sprint carries the call to Denver over its long distance network. To borrow the FCC's words, Ameritech's local network is used for the purpose of completing an interstate call which begins at one location in the local calling area (Smith's house) and then "transits" Sprint's location in that calling area, on its way to Denver. Ameritech is providing a service to Sprint — access — and Sprint pays Ameritech FCC-imposed access charges for furnishing Sprint access to its local exchange network and to its customer on that local exchange network, Smith.

In some instances, a competing LEC, say TCG again, provides the connection between the interexchange carrier's POP and Ameritech's local network. For example: Smith is Ameritech's local customer; he calls his cousin in Denver; Ameritech hands off the call to TCG; TCG then carries the call to Sprint; and Sprint carries the call over its long distance network to Denver. In this instance, both Ameritech and TCG provide access to Sprint, and the access charges that Sprint pays for access to the local network are divided between Ameritech and TCG. And even though Ameritech handed off the call to TCG (just as it did when Smith called TCG customer Wilson in Chicago), Ameritech does not owe TCG reciprocal compensation. That is because TCG does not terminate this call; the final destination of the call is Smith's cousin's house in Denver, not Sprint's POP.

It is not only long distance companies that obtain access services from local exchange carriers. Indeed, as the FCC has explained, "Among the variety of users of access service are

facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, [and] enhanced service providers.” MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78. (An enhanced service provider offers services that combine the transmission of telecommunications with data processing and/or other enhancements.) And among the “enhanced service providers” that the FCC identified as consumers of access service are Internet service providers. See infra n. 11.

An Internet service provider (“ISP”), such as America Online, provides its customers access to the Internet, enabling them to communicate with other Internet users and web sites, each of which has its own Internet address and physical location.² The ISP connects to the local exchange network in order to offer its Internet service to end users served by that network. “Under one typical arrangement, an ISP customer dials a seven-digit number to reach the ISP server in the same local calling area. The ISP, in turn, combines “[computer and information processing functions] with transmission to enable users to access Internet content and services.” In re GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148, CC Docket No. 98-79, ¶ 6 (F.C.C. Oct. 30, 1998) (“GTE Tariff Order”) (SA1, 3-4).

Internet traffic is typically originated at a customer’s premises and carried to an ISP, and then routed from the ISP’s local point of presence (“POP”) to distant data centers or Internet locations beyond state and federal boundaries. This can be illustrated using the previous

² The Internet itself is a worldwide network of computers whose users communicate with and obtain data of every sort from each other. It is geographically boundless. As the Supreme Court described it, “The Internet is an international network of interconnected computers . . . that . . . enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world.” Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997).

example: Smith is still an Ameritech local customer, and he buys Internet service from the ISP, which purchases from Ameritech a connection to Ameritech's local network. When Smith wants to communicate with the CNN Web site in Atlanta, or to talk with his cousin in Denver via an Internet voice call, the ISP carries the transmissions between Smith and the Internet. But the transmissions must also be carried between Smith's personal computer (or even Smith's phone, in the case of some Internet voice calls) and the ISP, and that is done by Smith's local exchange carrier, Ameritech. Ameritech carries the transmissions over the same network facilities as it uses to carry a "regular" long distance call to an interexchange carrier — to the end office that serves Smith, and then from there to the ISP's point of presence. At that point, the transmission is handed off to the ISP, which routes the transmission onto the Internet, where it is destined for the CNN Web site or, in the case of the voice call, to Smith's cousin.

Therefore, Internet communications "do not terminate at the ISP[] . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user." GTE Tariff Order ¶ 19 (SA11). The customer uses the ISP as a conduit to receive information from (and send information to) Internet sites all over the country and the world. The ISP connects the customer to the Internet site she wants to visit and carries information from that site back to the customer. In other words, ISPs act as intermediaries for intrastate, interstate and international communications.

Ameritech has provided access service to the ISP, just as it provides access service to a long distance telephone company. And indeed, the FCC "traditionally has characterized the link from an end user to an [ISP] as an interstate access service." GTE Tariff Order ¶ 21 (SA13). The FCC, however, has exempted Internet traffic from the access charges that long distance

telephone companies pay local exchange carriers. See infra pp.30-32. Consequently, the ISP does not pay Ameritech access charges on the communication between Smith and the Internet, and Ameritech — by reason of this FCC treatment of the communication — is permitted to recover revenue instead by (1) charging Smith for his communication with the Internet in the same way as Ameritech charges Smith for local phone calls, and (2) charging the ISP for its connection to the local network in the same way as it charges a business for a local line.

The introduction of local competition to the preceding illustration completes the scenario that gives rise to this appeal. A competing LEC, TCG, has entered the local market, and the ISP has decided to buy its connection to the local network from TCG instead of Ameritech. When Smith calls the Internet now, Ameritech and TCG together carry the communication between Smith and the ISP: Ameritech originates the communication from Smith to TCG, and then TCG takes the traffic to the ISP's POP. From that point on, the transmission travels exactly as before — over the ISP's connection to terminate on the Internet, and on to the CNN Web site in Atlanta or Smith's cousin in Denver. Here, Ameritech and TCG have together provided access to the ISP. Again, though, the ISP is exempt from paying Ameritech and TCG access charges; accordingly, Ameritech recovers revenue from Smith and TCG recovers revenue from its ISP customer.

4. The Proceedings Below

a. Proceedings Before the ICC

In 1997, MCI, MFS and TCG filed complaints against Ameritech with the ICC, seeking to obtain money they alleged was due them under their Agreements as reciprocal compensation

for communications between Ameritech customers and the Internet via ISPs that are customers of those competing LECs. The complaints were consolidated, and AT&T and Focal intervened.

The ICC, on March 11, 1998, issued an Order (A1) that concluded as a matter of law that the Agreements require Ameritech to pay the Carrier Appellees reciprocal compensation for the Internet traffic at issue. The ICC focused on the provision in the Agreements that provides for reciprocal compensation

for transport and termination of Local Traffic billable by Ameritech or [the Carrier Appellee] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Appellee's] network for termination on the other Party's network.

The ICC rejected federal authority holding that Internet calls terminate at “the ultimate end points of the call (such as the databases and web sites accessed by an Internet user).” (A11.) Instead, it concluded that termination “occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned” (*id.*) — in other words, when Internet traffic is handed off to the ISP. In this manner, the ICC split each Internet communication into two segments: one between the consumer and the ISP, which the ICC denominated local traffic terminating at the ISP, and the other between the ISP and the ultimate destination on the Internet. The ICC held the former segment subject to reciprocal compensation, and discarded the latter as irrelevant. The ICC justified this call-splitting, or two-call theory, by drawing a distinction between “telecommunications,” provided by Ameritech and the Carrier Appellees, and “information service” provided by the ISP. As the ICC saw it, telecommunications end, and information services begin, at the ISP; accordingly, the ultimate destination of an Internet communication as a whole was immaterial. (A12.)

In addition to its determination that Internet traffic terminates at the ISP, the ICC concluded that “[t]he agreements unambiguously provide that reciprocal compensation is applicable to local traffic billable by Ameritech.” (A11.) The ICC then noted that Ameritech “currently charges end users local service charges when completing [Internet] calls” and concluded that “the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls.” (*Id.*) In other words, the ICC interpreted the Agreements to say that reciprocal compensation applies to all calls that the originating carrier bills to its local customers — without regard to whether or not the calls are actually local, or whether or not they “terminat[e] on the other party’s network.”

b. District Court Proceedings

On March 27, 1998, Ameritech brought an action in the Northern District of Illinois to challenge the ICC Order. On July 21, 1998, the district court issued an Opinion and Order (the “Opinion”) affirming the ICC Order. (A18.) The court rejected as irrelevant the ICC’s distinction between telecommunications and information services. (A40.) But even after overturning the foundation of the ICC Order, the court upheld the Order itself. The court first sustained the ICC’s reading of the “Local Traffic billable” language, finding it “neither arbitrary nor capricious.” (A43.)

The court then turned to the ICC’s call-splitting approach to “termination.” Even though it recognized that “Ameritech is correct that ‘end-to-end’ language [assessing termination based on the ultimate endpoint of a call as a whole] is used in some earlier FCC decisions” (A43), the court concluded that the ICC’s view was “not contrary to federal law.” (A43.) As the court saw it, the “end-to-end” assessment of termination in the federal precedents was “not convincing”

because the FCC had not specifically singled out Internet traffic for end-to-end treatment — that is, because “the FCC has not issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one ‘end.’” (*Id.*) The court then upheld the ICC view that termination occurs at the ISP (*id.*) and found irrelevant “[t]he fact that the ISP then connects the user to the Internet, where the user may access unlimited web sites.” (A45.)

STANDARD OF REVIEW

The questions before the district court were purely questions of law. The controlling questions in this case, under the 1996 Act and the Agreements that implement it, are where Internet traffic terminates as a matter of federal law and whether Internet traffic is local traffic or access traffic under federal law. Thus, Ameritech’s challenge is to the district court’s (and the ICC’s) legal conclusions, not to any finding of fact. Those legal conclusions are subject to *de novo* review under section 252(e)(6) of the Act. E.g., U.S. West Communications, Inc. v. Hix, 986 F. Supp. 13, 19 (D. Colo. 1997) (federal court applies *de novo* review to question whether state commission “has met the specific requirements of federal and state law”). The ICC likewise purported to interpret the Agreements as a matter of law, setting forth as the first basis for its decision the assertedly “unambiguous[]” provisions and the “plain reading” of the Agreements. (A11.) Accordingly, the ICC’s legal conclusions are also subject to *de novo* review. E.g., GNB Battery Technologies, Inc. v. Gould, Inc., 65 F.3d 615, 621 (7th Cir. 1995) (“Our review of the district court’s interpretation of the purchase agreement . . . is a matter of law, subject to the *de novo* standard of review.”).

SUMMARY OF ARGUMENT

Ameritech's Agreements with the Carrier Appellees provide for reciprocal compensation "as required by the Act" and "As Described in the Act." Thus, the Agreements implement the requirements of the 1996 Act — no more and no less. And the Act requires reciprocal compensation only on calls that the local exchange carrier terminates on its network. In implementing these requirements, the Agreements all provide:

Reciprocal compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier Appellee] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Appellee's] network for termination on the other Party's network.

(SA34; SA61; SA67; SA91; SA103.) Accordingly, Ameritech (and the Carrier Appellees) are required to pay reciprocal compensation on communications that:

- terminate on the other carrier's network; and
- are local traffic.

Internet communications do not satisfy either of those requirements.

1. Internet Traffic does not Terminate on the Other Carrier's Network

Under federal law, a communication terminates only at its ultimate destination, not at intermediate switching or routing points along the way. Thus, a carrier "terminates" a call on its network when and only when its facilities deliver the call to its final destination. Under federal law, the final destination of an Internet communication is not the ISP; it is the Internet. Thus, Internet communications do not terminate at the ISP; they terminate on the Internet. The ISP is but a conduit or intermediary through which the Internet customer receives information from (and transmits information to) Internet sites located throughout the country and the world. The FCC made this crystal clear in its recent GTE Tariff Order (§ 19): These "communications . . .

do not terminate at the ISP[] . . . but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.” (SA11). The Internet communication that passes through the ISP is “a continuous transmission from the end user to a distant Internet site.” Id. ¶ 20 (SA13). The FCC reiterated these holdings in an order concerning Internet access services offered by Bell Atlantic and other carriers. In re Bell Atlantic Tel. Cos.; Bell Atlantic Tariff No. 1; Bell Atlantic Transmittal No. 1076, CC Docket Nos. 98-168 et al. (F.C.C. Nov. 30, 1998) (Bell Atlantic Tariff Order) (SA217, 225).

Moreover, these FCC holdings do not break any new ground. On the contrary, they extend an unbroken string of consistent federal decisions that stretch back over fifty years. These precedents all hold that a communication terminates at its ultimate destination — not at any intermediate switching or routing point. Under these precedents, it is clear (and has been clear for many years) that Internet communications terminate at Internet sites, not at the ISP.

The ICC, however, held that Internet communications terminate at the ISP, and the district court found this holding not inconsistent with federal law and therefore let it stand. The ICC and the district court were wrong. The FCC’s GTE and Bell Atlantic tariff orders and the decades-long body of law on which they rest leave no doubt that the ICC got it exactly backward: As a matter of federal law, Internet communications terminate on the Internet, not at the ISP.

2. Internet Traffic Is Not Local Traffic

To conclude that the district court’s judgment must be reversed, this Court need go no further. That Internet communications terminate on the Internet and not at the ISP is dispositive. But Internet traffic is not subject to reciprocal compensation for a second reason as well: It is not

local traffic. Rather, it is interstate access traffic for which the local exchange carrier furnishes the ISP *access* to its local phone network and the end users that are connected to that network, in the same way as it furnishes long distance companies the same access. And the ISP uses this access service to provide its predominantly interstate services — access to the World Wide Web — to its end user customers. The service that the local exchange carrier provides for Internet traffic therefore is not local exchange service, but *access* service.

In a series of decisions over the past fifteen years, the FCC has repeatedly ruled that (1) Internet traffic between the end user and the ISP is interstate access traffic, not local traffic, and (2) when a local exchange carrier transmits Internet communications between its local customers and the ISP, it is providing access service to the ISP. In these decisions, the FCC has held that “enhanced service providers” — a category that includes ISPs — could be required to pay access charges to the local carrier for this access service. While the FCC historically has exempted ISPs from these charges, it did so purely for policy reasons, not because the traffic is local. Indeed, the very fact that the FCC found it necessary to exempt ISPs from paying access charges confirms that ISPs are in fact using an interstate access service. As the FCC explained in its GTE Tariff Order (§ 21): “That the Commission *exempted* [enhanced service providers] from access charges indicate its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary.” (SA13.)

Accordingly, under federal law, and the Agreements that implement it, Internet communications are not local traffic. Again, however, the ICC mistakenly concluded otherwise. First, the ICC held that “the FCC has determined that ISP traffic is *not* an exchange access service” (A12), which the FCC has unequivocally said it is. Second, the ICC seized on the

unremarkable fact that Ameritech — by reason of the access charge exemption — bills its local customers for Internet traffic in the same way it bills them for local traffic, and leaped to the conclusion that that makes Internet traffic local traffic. The district court held that this non sequitur did not violate federal law, and then sustained it as not unreasonable.

The ICC and the district court were wrong as a matter of law. As the FCC has held, the facts that ISPs are exempt from interstate access charges, and that end users are billed for Internet traffic in the same way as they are billed for local traffic, “do[] not transform the nature of traffic routed to [ISPs].” GTE Tariff Order ¶ 21 (SA13). This traffic is interstate access traffic, not local traffic, no matter how it is billed.

ARGUMENT

Under the 1996 Act, a local exchange carrier is entitled to reciprocal compensation only for local calls that it terminates on its local network. 47 U.S.C. § 251(b)(5); *id.* § 252(d)(2)(A)(i) (reciprocal compensation arrangements between local exchange carriers must “provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier”). The Agreements were based on and implement the Act. They insistently proclaim that fact, starting with their names (“Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996”), and continuing through their headings and their provisions that recite, for example, that the Agreements “set forth . . . the terms and conditions under which the Parties will interconnect their networks and provide other services as required by the Act as set forth herein.” (See *supra* pp. 4-6.)

More importantly, the Agreements' reciprocal compensation provisions mirror the Act. The Agreements declare outright that: "Reciprocal Compensation' is As Described in the Act," and the reciprocal compensation provisions in each Agreement appear under a heading that cites section 251(b)(5) of the Act. (See supra p. 5.) Finally, consistent with the Act, each Agreement provides:

Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [Carrier Appellee] which a Telephone Exchange Service Customer originates on Ameritech's or [Carrier Appellee's] network for termination on the other Party's network."

(SA34; SA61; SA67; SA91; SA103) (emphasis added). Thus, based on the plain language of the Agreements, in order to be subject to reciprocal compensation under the Agreements, traffic must (1) terminate on the compensated carrier's network; (2) be local traffic; and (3) be billable by the originating carrier.

Internet traffic is not subject to reciprocal compensation under the Agreements for two reasons: First, it does not terminate on Ameritech's or any Carrier Appellee's local network. (Section I below.) Second, it is not local traffic. (Section II below.) And the mere fact that Ameritech bills its customers for Internet traffic in the same way as it bills them for local traffic does not turn Internet traffic into local traffic, and does not subject Internet traffic to reciprocal compensation under the Agreements. (Section III below.)

I. Ameritech Is Not Required To Pay Reciprocal Compensation On Internet Traffic Because Internet Traffic Does Not Terminate At Internet Service Providers' Facilities On The Parties' Local Networks, But On Internet Web Sites.

Under the Agreements, Ameritech and the Carrier Appellees are entitled to reciprocal compensation only for traffic that they terminate on their own networks. They are not, therefore, entitled to reciprocal compensation for Internet traffic because, as the FCC has made crystal

clear, Internet traffic “do[es] not terminate at the ISP’s local server . . . , but continue[s] to the ultimate destination or destinations” on the Internet. GTE Tariff Order ¶ 19 (SA11).

A. **The ICC’s Conclusion that Internet Traffic Terminates at the Internet Service Provider’s Facilities was Contrary to Federal Law, and the District Court Erred by Failing to Reverse the ICC Order on that Ground.**

As we show below, the federal courts and the FCC have long held that the point at which a communication terminates must be determined by looking at the whole communication, from end to end. The district court acknowledged the end-to-end precedents (A43), but dismissed them as “not convincing” because they preceded the 1996 Act and because, in the court’s view, the FCC had not specifically applied the end-to-end approach in the precise context of Internet traffic. As the court put it, “the FCC has not issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one ‘end.’” (Id.) Having thus concluded that the ICC’s determination that Internet traffic terminates at the ISP did not run afoul of federal law (id.), the district court deferred to that determination.

The district court was wrong. As the FCC made clear in the GTE Tariff Order (¶ 17), the FCC “consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.” (SA10.) Accordingly, the FCC ruled:

Consistent with these precedents, we conclude that the communications at issue here do not terminate at the ISP’s local server, as some competitive LECs and ISPs contend [and as the ICC Order held], but continue to the ultimate destination or destinations, very often at a distant Internet website accessed by the end user.

Id. ¶ 19 (SA11). The FCC then reiterated that ruling a month later in the Bell Atlantic Tariff Order. (SA225.)

Thus, the law is clear. Internet traffic terminates on the Internet. It does “not terminate at the ISP’s local server as some competitive LECs [including the Carrier Appellees] and ISPs

contend” (GTE Tariff Order ¶ 19, SA11), and that means it does not terminate on the local network of Ameritech or any of the Carrier Appellees who provide the connection between an ISP and the local network. Consequently, Internet traffic is not subject to reciprocal compensation under the Agreements or federal law.⁸

Moreover, there was nothing new about the FCC’s end-to-end analysis in the GTE and Bell Atlantic tariff orders. Both rulings simply applied precedents that had been on the books for years. The district court should have applied those precedents and held that the Internet traffic at issue here terminates on the Internet and not at the ISP.

The end-to-end approach was recognized as early as 1944, when a federal court rejected the argument that local access to a hotel’s private branch exchange switchboard could be viewed as distinct from the long distance call that followed. As the court concluded, “the Communications Act contemplates the regulation of interstate wire communication from its inception to its completion.” United States v. AT&T, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), aff’d, 325 U.S. 837 (1945).

Since then, courts have applied the end-to-end approach to an array of services and technologies. In General Tel. Co. v. FCC, 413 F.2d 390, 397 (D.C. Cir. 1969), the D.C. Circuit declined AT&T’s invitation to segment a two-part service that involved technologically distinct

⁸ To be sure, the FCC has said that in ruling that Internet traffic terminates on the Internet rather than at the ISP, it was not ruling on the applicability of reciprocal compensation to Internet traffic. GTE Tariff Order ¶ 2 (SA1-2); Bell Atlantic Tariff Order ¶ 2 (SA218). But given the dispositive effect that the reciprocal compensation provisions in the Agreements assign to termination, that does not matter. The Agreements were not and are not before the FCC, and Ameritech’s position in this case does not depend on an FCC resolution of the reciprocal compensation issue. The FCC’s ruling on where Internet traffic terminates — by itself — determines the outcome of this case.

components. To provide the service at issue, a cable operator used an antenna to receive television signals, and then delivered those signals to customers over local telephone lines. The D.C. Circuit held that even though two different technologies were involved in the overall service, the “stream of communication is essentially uninterrupted and properly indivisible.”

General Tel. Co., 413 F.2d at 401. As the Court explained:

The controlling facts here are that the cable facilities furnished by the telephone companies are links in the continuous transmission of the signals from the point of origin to the set of the viewer, and the intelligence received by the viewer is essentially the same as that transmitted by the broadcaster. Irrespective of the location of its physical facilities, the common carrier which thus participates as a link in the relay of the television signals is performing an interstate communications service.

Id. at 398; see also Idaho Microwave, Inc. v. FCC, 352 F.2d 729, 732 (D.C. Cir. 1965) (holding that because microwave transmission facility in Idaho was “used as a link in the continuous transmission of television signals from [Utah] to [Idaho],” the Idaho facility “performs an interstate communication service when it takes part in the transmission of signals from Utah to Idaho”).

Not only the courts, but the FCC as well has repeatedly held that the boundaries of a communication are determined on an end-to-end basis, and has rejected all claims that a communication “terminates” at an intermediate point along the way. In Teleconnect v. Bell Tel. Co., 10 F.C.C. Rcd. 1626 (Jan. 26, 1995), aff’d sub. nom Southwestern Bell Telephone Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997), the FCC rejected the argument that a 1-800 call used to connect to a long distance carrier’s switch was severable from the call that was placed from that switch:

[A] caller using the Teleconnect ACA service is making a single call. . . . [B]oth court and Commission decisions have considered the end-to-end nature of the

communications more significant than the facilities used to complete such communications. ... [T]he interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities.

Id. ¶ 12. Continuing, the FCC observed (id. ¶ 14):

In general, all of the defendants' arguments ignore the fact that ACA service conveys a single communication from the caller to the called party. Indeed, from the caller's point of view, any intermediate switching during the call is, as Teleconnect claims, "transparent." The record reflects that the user of ACA service intends to make a single call terminating not at the Teleconnect intermediate switch, where the megacom link ends, but at the telephone line of the called party.

See also In re Southwestern Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68, 3 F.C.C. Rcd. 2339, ¶ 26 (Mar. 31, 1988) (rejecting assertion that calling-card communication could be severed into two calls, because "[t]he jurisdictional nature of a call is determined by its ultimate origination and termination, and not . . . its intermediate routing") (Order Designating Issues for Investigation); Long-Distance/USA, Inc., 10 F.C.C. Rcd. 1634, ¶ 13 (Jan. 26, 1995) (rejecting argument that 1-800 calls could be split into two components: "[B]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications . . . a single interstate communication does not become two communications because it passes through intermediate switching facilities"); In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (holding that when an out-of-state caller accesses a voice mail service, there occurs a single interstate communication, which begins with the caller and terminates at the ultimate destination of the information service — the voice mail equipment).

Thus, the district court's undoing was not just its failure to look forward (to the GTE and Bell Atlantic tariff orders), but its unduly narrow reading of the precedents. The same end-to-end precedents that inexorably led the FCC to conclude in the GTE Tariff Order (¶¶ 17-19) that Internet traffic terminates on the Internet (SA10-11) should have led the district court to the same conclusion.

B. The ICC's Only Legal Rationale for not Applying the End-to-End Approach to Internet Traffic — the Telecommunications vs. Information Service Dichotomy — is Contrary to Federal Law.

The only legal ground that the ICC offered for not applying the federal end-to-end precedents was a distinction between “telecommunications” provided by Ameritech and the Carrier Appellees and “information services” provided by the ISP. (A11-12.) As the ICC saw it, the telecommunication ends, and information services begin, at the ISP; accordingly, the ultimate destination of an Internet communication as a whole was immaterial, and the telecommunication — terminating, in the ICC's eyes, at the ISP — was subject to reciprocal compensation. (A12.)²

The ICC's telecommunications vs. information service rationale for its conclusion that Internet traffic terminates at the local facilities of the ISP is contrary to federal law and was flatly rejected by the FCC in the GTE Tariff Order (SA12-13). And for good reason. The difference between a telecommunications carrier and an information service provider, such as an ISP, is simply that a telecommunications carrier offers pure transmission service, while an information

² The ICC Order refers to testimony regarding alleged industry practice. (A44.) That testimony has no bearing on the issues in this appeal because, as the Agreements unambiguously provide, the parties' reciprocal compensation obligations depend solely on the requirements of federal law.

service provider offers something *in addition to* (not instead of) transmission. Specifically, an information service provider combines telecommunications with enhancements, such as data processing and other functions. As the FCC explained in its Report to Congress on Universal Service, ISPs “lease lines, and otherwise acquire telecommunications, from telecommunications providers — interexchange carriers, incumbent local exchange carriers, competitive local exchange carriers, and others. In offering services to end users, they . . . conjoin . . . transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.” In re Federal-State Joint Board on Universal Service, FCC 98-67, Report to Congress, CC Docket No. 96-45, ¶ 81 (April 10, 1998) (“Universal Service Report”) (SA125.) And as Congress put it in the 1996 Act, “The term ‘information service’ means the offering of a capability for generating, acquiring, [etc.] information *via telecommunications*.” 47 U.S.C. § 41 (emphasis added).

Given that ISPs provide transmission plus enhancements, the ICC’s view that the telecommunications component of an Internet communications ends at the ISP is just plain wrong. *The telecommunication runs end to end.* And that is why the FCC rejected the ICC’s approach in the GTE Tariff Order. As the FCC explained there, the FCC “has never found that ‘telecommunications’ ends where ‘enhanced’ information service begins. . . . Under the definition of information service [in] the 1996 Act, an information service, while not a telecommunications service itself, is provided *via telecommunications*.” (SA12.) On that basis, the FCC concluded, Internet traffic must be analyzed “as a continuous transmission from the end user to a distant Internet site.” (SA13.) Obviously, the ICC’s two-call theory, whose one and

only legal ground was the telecommunications/information services dichotomy, cannot survive the FCC's repudiation of that dichotomy in the GTE Tariff Order.

The district court itself, even without the benefit of the GTE Tariff Order, correctly rejected the ICC's telecommunications/information service analysis, stating that "to the extent that this portion of the Commission's decision relies heavily on the distinction between information service and telecommunications, this court rejects that analysis." (A41.) And indeed, the dichotomy that the ICC relied on was contrary to FCC precedent as it stood even when the district court ruled. In 1998, but still before it issued its GTE Tariff Order, the FCC specifically rejected the notion that an Internet communication could be split into a telecommunication and a separate information service. In its April 10, 1998, Universal Service Report, the FCC held the telecommunications/information service distinction irrelevant to the very Internet reciprocal compensation issue to which the ICC sought to apply it, stating that the reciprocal compensation issue "does *not* turn on the status of the Internet service provider as a telecommunications carrier or information service provider." Universal Service Report ¶ 106 n.220 (emphasis added) (SA137-38).

Thus, the district court was absolutely correct when it rejected the ICC's telecommunications vs. information service call-splitting analysis. (A41.) Having repudiated the only purported legal ground for the ICC's refusal to apply the required end-to-end approach to Internet traffic, however, the district court should have gone the next step and rejected as a matter of federal law the ICC's conclusion that Internet traffic terminates at the ISP. Its failure to do so was error.

II. Ameritech Is Not Required To Pay Reciprocal Compensation On Internet Traffic Because Internet Traffic Is Not Local Traffic, But Interstate Access Traffic.

There is no need for this Court to look beyond the controlling federal rule that Internet traffic terminates on the Internet. That rule alone requires that the district court's judgment be reversed and that the ICC's Order be vacated. In addition, however, the only traffic that is subject to reciprocal compensation under the parties' Agreements is local traffic,¹⁰ and, as a matter of federal law, Internet traffic is not local traffic. It is access traffic, which because of the global reach of the Internet is predominantly interstate. And the service that Ameritech and the Carrier Appellees provide when they furnish the connection between an Internet user and his or her Internet service provider — just like the service they provide when they furnish the connection between a caller and his or her long distance company — is access.

A. Under Federal Law, a Connection to the Internet Through an Internet Service Provider is Interstate Access Traffic.

In its October 30, 1998, GTE Tariff Order (¶ 1), the FCC held:

In this Order, we conclude our investigation of a new [Internet] access offering filed by GTE We find that this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level.

(SA1.) Later in its decision, the FCC, true to its “traditional[.]” view that “characterize[s] the link from an end user to an ESP [enhanced service provider] as an interstate access service” (id.

¹⁰ “Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [Carrier Appellee] which a Telephone Exchange Service Customer originates on Ameritech's or [Carrier Appellee's] network for termination on the other Party's network.” (SA34; SA61; SA67; SA91; SA103) (emphasis added).

¶ 21 (SA13)), repeated, “We agree that GTE’s . . . service offering is an interstate service” (*id.* ¶ 16 (SA9)). See also Bell Atlantic Tariff Order, ¶ 14 (incorporating analysis of GTE Tariff Order and reaching same result) (SA225).

These recent rulings that Internet traffic is interstate access traffic were no more unprecedented than the FCC’s rulings in the same orders that Internet traffic terminates on the Internet. Quite the contrary, the FCC has held for fifteen years that such traffic is interstate access traffic.

As early as 1983, when the FCC created the access charge regime, the FCC held that “enhanced service providers” — which includes ISPs¹¹ — “obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing *interstate calls*.” MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (emphasis added). See also id. ¶ 83. In this respect, the FCC found ISPs were indistinguishable from long distance telephone companies. “In each case,” the FCC explained, “the user obtains local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit its location and, commonly, another location in the exchange area.” *Id.* ¶ 78.¹²

¹¹ See In re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 284 (Dec. 23, 1996) (the “category of enhanced services . . . includes access to the Internet”).

¹² The FCC’s analysis in MTS and WATS Market Structure corroborates Ameritech’s position concerning termination as set forth in the preceding section. As the FCC said, the “interstate calls” facilitated by enhanced service providers merely “transit” the provider’s location — in other words, those calls do not, as the ICC mistakenly held, “terminate” at the ISP’s location. Driving the point home, the FCC further stated that the overwhelming majority of ISP traffic does not terminate at the ISP’s premises, noting that an enhanced service provider “might terminate few calls at its own location and thus would make relatively heavy interstate use of local exchange services and facilities.” *Id.* ¶ 78 (emphasis added). (The “few calls” that the FCC recognized an ISP might terminate

Like all other interstate traffic for which local exchange carriers provide access, calls to the Internet are subject to the imposition of access charges. And at the dawn of the access charge regime in 1983, the FCC intended to establish a uniform structure for access charges “covering those services that make identical or similar use of access facilities,” including the information services provided by “enhanced service providers” such as ISPs. MTS and WATS Market Structure, 93 F.C.C. 2d 241, ¶ 24 (Dec. 22, 1982).

Ultimately, however, the FCC carved out an exemption for ISPs. MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 83. This exemption was not based on a determination that ISP traffic was local. Far from it, the FCC specifically held that, “Among the variety of users of access service are facilities-based carriers, resellers (who use facilities provided by others), sharers, privately owned systems, [and] enhanced service providers.” Id. ¶ 78. As the FCC recognized, a connection from a local exchange carrier to an enhanced service provider is access service, because “enhanced service providers . . . obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls.” Id. (emphasis added). Further, the FCC confirmed that “[o]ur intent was to apply these carrier’s carrier [access] charges to . . . enhanced service providers.” Id. ¶ 76.

The access charge exemption was based on policy reasons that expressly recognized ISP traffic as interstate traffic for which local exchange carriers provide access. Due to the high costs of access service at the time, and the FCC’s desire to protect the fledgling information services industry from rate shock, the FCC held it would not subject ISP traffic to access

at its own location are regular, non-Internet traffic — such as phone calls by subscribers to an ISP’s business offices, or personal calls to its employees.)

charges. As the FCC put it, “[access] users who employ exchange service for jurisdictionally interstate communications, including . . . enhanced service providers [like ISPs] . . . would experience severe rate impacts were we immediately to assess carrier access charges upon them.” Id. ¶ 83. After that, the FCC emphasized that this “graduated transition” is temporary, and admonished that ISPs “have had ample notice of our ultimate intent to apply interstate access charges to their operations and ample opportunity to adjust their planning accordingly.”

In re Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers, 2 F.C.C. Rcd. 4305, ¶ 8 (June 10, 1987) (Notice of Proposed Rulemaking).

The FCC’s April 10, 1998, Report to Congress on universal service summarized the FCC’s treatment of enhanced services in a passage that leaves no doubt that when a local exchange carriers furnishes a connection on the local network to an enhanced service provider, including an ISP, the carrier is providing access, not local telephone service:

When it established the interstate access charge regime in the early 1980s, the Commission determined that enhanced service providers, even though they used local exchange networks to originate and terminate interstate services, would not be subject to access charges. Instead, enhanced service providers pay local business rates to LECs for their connections to the LEC network.

Universal Service Report, ¶ 146 (SA142). More, on October 30, 1998, when it held that GTE’s Internet access service is an interstate access service, the FCC once again followed its 1983 MTS and WATS Market Structure order, repeating that it “traditionally has characterized the link from an end user to an ESP as an interstate access service.” GTE Tariff Order, ¶ 21 (SA13).

Each of these rulings recognizes that communications traveling over the connection between an Internet user (or a user of any other enhanced service) and his or her Internet service provider (or any other enhanced service provider) is not local traffic, but instead is access traffic

for services that are predominantly interstate. If Internet traffic were local, it would not be subject to access charges in the first place, and the FCC would have had no reason to exempt it from such charges. The FCC itself confirmed this in the GTE Tariff Order (§ 21, SA13):

The fact that ESPs are exempt from certain access charges and purchase their [local network] links through local tariffs does not transform the nature of traffic routed to ESPs. That the Commission *exempted* ESPs from access charges indicates its understanding that they in fact use interstate access service; otherwise, the exemption would not be necessary.

Internet traffic, then, is access traffic — predominantly interstate access traffic. The FCC has authority to regulate that traffic, and it has done so by exempting it from the access charges that would otherwise apply to it. The ICC, on the other hand, does not have authority to regulate interstate access service, or to impose a reciprocal compensation obligation on a LEC that provides such service. Under section 251(g) of the Act (47 U.S.C. § 251(g)), Ameritech is required to provide access to ISPs in accordance with the same restrictions and obligations (and subject to the same compensation scheme) that existed before the passage of the Act absent action by the FCC. When the Act became law, the FCC's access charge exemption was well-established; no reciprocal compensation obligation existed for Internet traffic. Yet, under the guise of contract interpretation, the ICC dramatically altered the FCC's access charge regime in violation of section 251(g). But the Agreements, by their terms, are not subject to this end-run around federal law. Under the Agreements, the parties' obligations are perfectly aligned with federal law; they require nothing more and nothing less than what is required by the Act. By foisting on Ameritech the obligation to pay reciprocal compensation on an access service, the ICC clearly overstepped its authority.

B. The District Court Erred by Failing to Reverse the ICC Order on the Ground that Internet Traffic is Interstate Access Traffic Rather than Local Traffic.

Because Internet traffic is interstate access traffic, and not local traffic, it is not subject to reciprocal compensation, and the district court should have reversed the ICC Order on that ground, as well as on the ground that the Carrier Appellees do not terminate Internet traffic on their local networks. The district court in fact quoted the FCC's ruling in the 1983 MTS and WATS Market Structure order that enhanced services traffic is interstate access traffic (A39), but it chose not to follow that order, or the steady stream of FCC jurisprudence that follows it, instead concluding that there was "no clear FCC position" on the matter. (A40.)

This was error. In the GTE Tariff Order (§ 1), the FCC held that the furnishing of the connection between an Internet user and the local facilities of his or her ISP is an interstate service (SA1), and based that conclusion on its "traditional[]" view that "characterize[s] the link from an end user to an ESP as an interstate access service" (*id.* § 21(SA13)). The district court erred by not following the settled rule that the link from end user to ESP (here, an ISP) is an interstate access service. The district court offered two reasons for not doing so, but neither reason holds up.

First, the district court noted that the FCC was considering, in an ongoing proceeding, "the precise [Internet reciprocal compensation] issue under review in the instant case." (A35.) As the court saw it, the mere fact that the FCC proceeding was pending meant that the issue "has not been resolved." (*Id.*) The court thus focused too tightly on the "precise issue" of Internet reciprocal compensation and blinded itself to the underlying — and controlling — question. True, the FCC has not ruled on the precise question whether reciprocal compensation applies to

Internet traffic. But that makes no difference. The 1996 Act, and the rulings that the FCC has made, lead inexorably to the conclusion that Internet traffic is not local traffic and therefore is not subject to reciprocal compensation under the parties' Agreements. The district court did not need an FCC ruling on reciprocal compensation to reach that conclusion.

Second, the district court misconstrued two snippets from FCC rulings in a way that led it to conclude, mistakenly, that the FCC's overall position was unclear. (A38.) Read in context, the two FCC statements actually reinforce the long line of FCC authority that Internet traffic is not local.

The court first focused on an FCC statement that ISPs have deployed multiple points of presence "[t]o maximize the number of subscribers that can reach them through a *local call*." (Id. (emphasis added) (quoting In re Access Charge Reform, First Report and Order, 12 F.C.C. Rcd. 15982, ¶ 342 n.502 (May 16, 1997), aff'd sub nom. Southwestern Bell Tel. Co. v. F.C.C., 153 F.3d 523 (8th Cir., 1998) ("Access Charge Reform")).) That FCC statement, however, appeared in a footnote to the following text:

In the 1983 Access Charge Reconsideration Order, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, ISPs should not be required to pay interstate access charges. In recent years, usage of *interstate* information services, and in particular the Internet and other interactive computer networks, has increased significantly. . . .

As a result of the decisions the Commission made in the Access Charge Reconsideration Order, ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.

Access Charge Reform, 12 F.C.C. Rcd. 15982, ¶ 342.

In context, then, the FCC's footnote merely said that ISPs have deployed local points of presence in order to take advantage of the FCC's access charge exemption, under which ISPs do not pay access charges even though they "use incumbent LEC facilities to originate and terminate interstate calls," and under which end users can pay local rates for Internet communications even though they "appear to traverse state boundaries." The necessary predicate for that exemption is the FCC's rule that such calls are interstate access traffic that would otherwise be subject to access charges. Far from contradicting the FCC's rulings that Internet traffic is interstate access traffic, the cited language bolsters them.

The district court also misread an FCC statement that "rate structures for [Internet] calls are appropriately addressed by state, rather than federal, regulators." (A38 (citing Access Charge Reform, ¶¶ 345-46).) Once again, though, the FCC was not saying that Internet traffic is local; indeed, the FCC's statement came from the Access Charge Reform order quoted above, and appears shortly after the FCC's acknowledgment (also quoted above) that Internet communications "appear to traverse state boundaries." Thus, the FCC was only acknowledging that, due to its exemption policy, Internet communications are currently billed at the same rates as local calls, and that any concerns as to the inadequacy of local rates had to be addressed to the state bodies that set those rates. As with the footnote discussed above, the district court looked only at the access charge exemption, and failed to appreciate the underlying rule: that Internet traffic is not local traffic.

Finally, it is telling that the isolated FCC statements that gave the district court such pause did not slow the FCC one bit when it said in its October, 1998, GTE Tariff Order (¶ 21) that it "traditionally has characterized the link from an end user to an [ISP] as an interstate access

service,” or when it ruled (id. ¶ 19): “Consistent with these precedents, we conclude that the communications at issue here do not terminate at the ISP’s local server . . . but continue to the ultimate destination or destinations, very often at a distant website accessed by the end user.” (SA11, 13.)

III. Ameritech Does Not Transform Internet Traffic From Interstate Access Traffic Into Local Traffic By The Way It Bills Internet Traffic To Its Local Customers.

As we have demonstrated, Ameritech cannot lawfully be required to pay the Carrier Appellees’ reciprocal compensation on Internet traffic under the Agreements because, as a matter of federal law, Internet traffic (1) terminates not at the ISP’s local facilities, but on the Internet (Section I, supra), and (2) is not local traffic, but predominantly interstate traffic for which Ameritech and the Carrier Appellees provide access (Section II, supra). The ICC, however, concluded that Ameritech must pay reciprocal compensation on Internet traffic under the Agreements because Ameritech bills its local customers for the Internet traffic they originate in the same way as it bills them for local traffic. And the district court uncritically accepted the ICC’s conclusion. While acknowledging that “reasonable persons may differ,” the court found the ICC’s view — that traffic can become local traffic by being billed like local traffic — was “neither arbitrary nor capricious.” (A43.)

As a matter of federal law, however, Internet traffic is access traffic. It cannot mutate into local traffic because of the way it is billed. See GTE Tariff Order (¶ 21) (explaining that FCC treatment of ISPs “as end users” by exempting them from access charges did not transform access traffic into local traffic that terminates at ISPs) (SA13). Furthermore, the ICC’s conclusion that Ameritech’s billing treatment of Internet traffic makes it local traffic subject to reciprocal compensation rested on an utter butchering of the language in the Agreements.

The Agreements provide for reciprocal compensation on

Local Traffic billable by Ameritech or [the Carrier Appellee] which a Telephone Exchange Service Customer originates on Ameritech's or [the Carrier Appellee's] network for termination on the other Party's network.

(SA34; SA61; SA67; SA91; SA103).

In plain English, traffic cannot be "Local Traffic billable" unless it is local traffic in the first place. Thus, the requirement that local traffic be billable by the originating carrier *limits* the universe of local traffic to which reciprocal compensation applies. If a local call is not billable by the originating carrier — because, for example, it gets a busy signal — it is not subject to reciprocal compensation.

The ICC, however, concluded that Ameritech must pay reciprocal compensation on Internet traffic under the Agreements because Ameritech bills its customers who originate Internet traffic in the same way as it bills them for originating local calls. (A11.) In so concluding, the ICC made a colossal mistake: It read the Agreements to say that traffic can be "Local Traffic billable" even if it is not local traffic. That is, the ICC read out of the Agreements the requirement that traffic must *be* local to be subject to reciprocal compensation, as if the Agreements said "traffic billed as local" instead of what they do say — "Local Traffic billable." On its face, the inclusion of the word "billable" in the Agreements adds a condition that traffic must meet to be subject to reciprocal compensation. It does not, as the ICC concluded, subtract one.

Finally, even if access traffic could be transformed into local traffic by being billed at local rates to the end users who originate it, Internet traffic still would not be subject to reciprocal compensation. Under federal law and the Agreements, the Carrier Appellees are

entitled to reciprocal compensation only on traffic that they terminate on their networks. As the FCC has held, Internet traffic does not terminate at the facilities of Internet service providers on the local exchange carrier's network, but at the Internet sites that the Internet user accesses through the ISP. And nothing about the way Ameritech bills the traffic can change that.

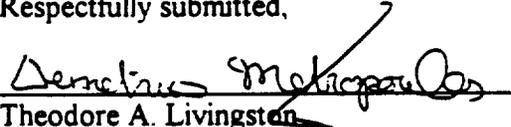
CONCLUSION

For all the reasons set forth above, Ameritech respectfully requests that this Court reverse the district court's Judgment and direct the court to enter judgment in favor of Ameritech, granting it the relief requested in its Complaint.

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